



6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R08-OAR-2019-0689; FRL-10006-14-Region 8]

#### Approval and Promulgation of Air Quality Implementation Plans; North Dakota; Revisions to Permitting Rules

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** In accordance with section 110 of the Clean Air Act (CAA), the Environmental Protection Agency (EPA) is proposing to approve State Implementation Plan (SIP) revisions submitted by North Dakota on May 2, 2019. The revisions contain amendments to the State's Ambient Air Quality Standards, Permit to Construct, and Prevention of Significant Deterioration (PSD) regulations.

**DATES:** *Comments:* Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R08-OAR-2019-0689, to the Federal Rulemaking Portal: <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [www.regulations.gov](https://www.regulations.gov). The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is

considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

*Docket:* All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Division, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. The EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Kevin Leone, Air and Radiation Division, EPA, Region 8, Mailcode 8P-ARD-QP, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, (303) 312-6227, [leone.kevin@epa.gov](mailto:leone.kevin@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever “we,” “us” or “our” is used, we mean the EPA.

## **I. Background**

On May 2, 2019, the State of North Dakota submitted SIP revisions containing amendments to N.D. Admin. Code Chapter 33.1-15 (Air Pollution Control). The amendments address changes to the State's Ambient Air Quality Standard for ozone and update the State's PSD rules and permit-to-construct rules. These revisions became effective as a matter of State law on January 1, 2019. We are proposing to approve all of these revisions, except for one provision described below that we are addressing in a separate action, and another provision that we are declining to act on in anticipation of a further State submittal.

## **II. Analysis of North Dakota's May 2, 2019 Submittal**

### *A. Revisions to Chapter 33.1-15-15 (Prevention of Significant Deterioration of Air Quality)*

North Dakota's May 2, 2019 submittal includes updates to the State's PSD regulations at 33.1-15-15-01.2. The current SIP-approved North Dakota rule incorporates by reference 40 CFR 52.21 paragraphs (a)(2) through (e), (h) through (r), (v), (w), (aa) and (bb), as of July 1, 2015. Since that date, the EPA has promulgated revisions to 40 CFR 52.21, in response to the *Utility Air Regulatory Group (UARG) v. EPA* decision addressing PSD permitting and greenhouse gas (GHG) emissions.<sup>1</sup> In *UARG*, the Supreme Court held that the EPA may not treat GHGs as air pollutants for purposes of determining whether a source is a major new source or modification required to obtain a PSD permit. The Court also held that the EPA could continue to require that PSD permits otherwise required based on emissions of non-GHG pollutants contain limits on GHG emissions based on the application of Best Available Control Technology (BACT). In

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<sup>1</sup> 134 S. Ct. 2427 (2014) (*UARG*).

response to the *UARG* decision, and to the subsequent Amended Judgment issued by the D.C. Circuit,<sup>2</sup> in August 2015 the EPA revised the federal PSD rules to remove provisions vacated by the court, including 40 CFR 52.21(b)(49)(v) and 40 CFR 51.166(b)(48)(v).<sup>3</sup> The May 2, 2019 submittal updates the State's incorporation by reference of 40 CFR 52.21 to reflect the federal rule as of July 1, 2018, which encompasses the EPA's 2015 revisions removing the vacated provisions.

North Dakota is also correcting the following typographical errors: (1) in section 33.1-15-15-01.2, the reference to 40 CFR 52.21(23)(i) is changed to 40 CFR 52.21(b)(23)(i); and (2) in section 33.1-15-15-01.2, the reference to 40 CFR 52.21(k)(l)(l) is changed to 40 CFR 52.21(k)(l)(i). In addition, in section 33.1-15-15-01.2, the "substitute language" for 40 CFR 52.21(w)(l) is deleted. That is, the State is removing previously approved language containing minor changes to the federal regulation at 40 CFR 52.21(w)(1), with the result that the federal regulation as written will be incorporated by reference into the State rules.

This SIP submittal also includes an amendment to section 33-15-15-01.2, addressing PSD modeling guidance by referring to 40 CFR part 51, appendix W (Guideline on Air Quality Models) as it existed on July 1, 2018. This supersedes a comparable provision in North Dakota's January 28, 2013 SIP submittal that referenced appendix W as of January 1, 2012. The EPA has not yet acted on that provision in the 2013 submittal and will not be taking action in it now that it

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<sup>2</sup> *Coalition for Responsible Regulation v. EPA*, 606 F. App'x 6, 7–8 (D.C. Cir. April 10, 2015).

<sup>3</sup> See Final Rule, Prevention of Significant Deterioration and Title V Permitting for Greenhouse Gases: Removal of Certain Vacated Elements, 80 FR 50199 (August 19, 2015).

has been superseded.<sup>4</sup> We have proposed to act in a separate rulemaking on the 2019 submittal's provision amending section 33-15-15-01.2, as it relates to updating the incorporation by reference date to July 1, 2018 to be consistent with the current 40 CFR 52.21(l)(1) provision.<sup>5</sup> Thus, we will not be acting on that revision in this proposed rulemaking.

*B. Revisions to Chapter 33-15-14 (Designated Air Contaminant Sources, Permit to Construct, Minor Source Operating Permit, Title V Operating Permit)*

In its 2013 submittal, North Dakota amended chapter 33-15-14-02, *Permit to Construct*, to include a general permit provision, and the EPA approved this rule as part of the SIP.<sup>6</sup> On November 11, 2016, the State submitted an amended general permit regulation that included public participation language required by EPA regulations at 40 CFR 51.161. Specifically, the revised State regulation required that “a proposed general permit, any changes to a general permit, and any renewal of a general permit shall be subject to public comment” following specified procedures.<sup>7</sup> However, portions of section 6(a) of this State regulation contain provisions related to “director’s discretion” that could allow revisions to SIP-approved emission limits with limited public process, or without further approval by the EPA. In light of those concerns, North Dakota committed to revise the reference to “subsection 6 of 33-15-14-02” to “subdivision 6.b of 33-15-

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<sup>4</sup> The EPA has previously acted on all other portions of the 2013 submittal. *See* Final Rule, Approval and Promulgation of Air Quality Implementation Plans; North Dakota; Revisions to Air Pollution Control Rules, 81 FR 72716 (Oct. 21, 2016); Final Rule, Approval and Promulgation of Air Quality Implementation Plans; North Dakota; Revisions to Air Pollution Control Rules, 82 FR 46919 (Oct. 10, 2017); Final Rule, Approval and Promulgation of Air Quality Implementation Plans; North Dakota; Revisions to Air Pollution Control Rules, 84 FR 11646 (March 28, 2019).

<sup>5</sup> Proposed rule, Air Quality State Implementation Plans; Approvals and Promulgations: Infrastructure Requirements for the 2015 Ozone National Ambient Air Quality Standards; Colorado and North Dakota, 84 FR 36516 (July 29, 2019).

<sup>6</sup> *See* 82 FR at 46919.

<sup>7</sup> N.D. Admin. Code §§ 33-15-14-02.1.c, 33-15-14-02.6.

14-02” in a future submittal.<sup>8</sup> This revision included in North Dakota’s May 2, 2019 submittal revises 33.1-15-14-02.1.c by deleting the phrase “subdivision 6” and adding the phrase “subdivision b of subsection 6.” The EPA notes that “subdivision b of subsection 6” in section 33.1-15-14-02 refers to the same provision as “subdivision 6.b” of that section. Accordingly, we are approving this revised version of the State’s regulation at 33.1-15-14-02 into the SIP.

North Dakota is also correcting the following typographical errors in section 33.1-15-14-02(1)(c): the reference to 33-15-13 is changed to 33.1-15-13; the reference to 33-15-15 is changed to 33.1-15-15; and the reference to 33-15-22-03 is changed to 33.1-15-22-03.

*C. Revisions to Chapter 33.1-15-02 (Ambient Air Quality Standards)*

In 2015, the EPA promulgated a revised ozone National Ambient Air Quality Standard (NAAQS) of 0.070 parts per million (ppm).<sup>9</sup> When a new or revised NAAQS is promulgated, the CAA requires each state to submit a SIP revision to incorporate the new standard. In chapter 33.1-15-02-07 (Concentrations of air contaminants in the ambient air restricted), Table 1 (Ambient Air Quality Standards) was revised to reflect the 2015 ozone NAAQS of 0.070 parts per million. But the revision further states that “[t]he standard is met when the 3-year average of the annual fourth-highest daily maximum 8-hour average concentration at an ambient air quality

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<sup>8</sup> Letter from Terry O’Clair, Director, Division of Air Quality, North Dakota Department of Health to Monica Morales, Director, EPA Region 8 Air Program (May 3, 2018). We note that the North Dakota state legislature created the North Dakota Department of Environmental Quality (NDEQ) in 2017. The EPA subsequently approved changes to the North Dakota SIP to transfer authority to implement and enforce the EPA-approved SIP from the North Dakota Department of Health (NDDH) to the new NDEQ. Final Rule, Approval and Promulgation of Implementation Plans; North Dakota; Revisions to Infrastructure Requirements for All National Ambient Air Quality Standards; Carbon Monoxide (CO); Lead (Pb); Nitrogen Dioxide (NO), 84 FR 1610 (Feb. 5, 2019). We also approved a recodification of the State’s previously approved Air Pollution Control Rules, which changed the chapter number from 33 to 33.1. *Id.* The letter from Mr. O’Clair references regulations according to the previous numbering scheme. *See also* Final rule, Approvals Concerning Revisions to North Dakota’s Environmental Protection Programs; Delay of Effective Dates, 84 FR 8260 (March 7, 2019).

<sup>9</sup> Final Rule, National Ambient Air Quality Standards for Ozone, 80 FR 65292 (Oct. 26, 2015).

monitoring site is less than or equal to 0.075 ppm.” The reference to .075 ppm is erroneous. The EPA understands that North Dakota is currently addressing this error and plans to submit a revised version of Table 1 to the EPA for approval in the future. Accordingly, we are taking no action on the revision to 33.1-15-02-07, Table 1 in this rulemaking.

### **III. Proposed Action**

In this action, the EPA is proposing to approve SIP amendments to North Dakota’s Air Pollution Control Rules, shown in Table 1, submitted by the State of North Dakota on May 2, 2019.

**Table 1 - List of North Dakota Amendments that the EPA is Proposing to Approve**

<b>Amended Sections in the May 2, 2019 Submittal Proposed for Approval</b>
33.1-15-14-02; 33.1-15-15-01.2

### **IV. Consideration of Section 110(l) of the CAA**

Under section 110(l) of the CAA, the EPA cannot approve a SIP revision if the revision would interfere with any applicable requirements concerning attainment and reasonable further progress (RFP) toward attainment of the NAAQS, or any other applicable requirement of the Act. In addition, section 110(l) requires that each revision to an implementation plan submitted by a state shall be adopted by the state after reasonable notice and public hearing.

The North Dakota SIP revisions that the EPA proposes to approve do not interfere with any applicable requirements of the Act. The revisions to North Dakota’s Control of Air Pollution regulations submitted on May 2, 2019, ensure that the State’s PSD program is in compliance with federal requirements. Therefore, CAA section 110(l) requirements are satisfied.

### **V. Incorporation by Reference**

The EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the amendments described in section III of this proposed action. The EPA has made, and will continue to make, these materials generally available through [www.regulations.gov](http://www.regulations.gov) and at the EPA Region 8 Office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information).

## **VI. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not proposed to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. The rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Sulfur oxides.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: March 9, 2020.

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Gregory Sopkin,  
Regional Administrator,  
Region 8.

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